Opinion of Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 511, 876—September Term, 1974.

(Argued January 22, 1975 Decided March 3, 1975.)

Docket Nos. 74-2374, 74-2435

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

—against—

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Defendants-Appellees.

Before:

LUMBARD, HAYS and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge*, denying a motion to convene a three-judge court and dismissing the complaint, which sought declaratory and injunctive relief against mandatory age restrictions upon the term of office of certain state judges.

Affirmed.

STEPHEN GILLERS, New York, New York (Elliot A. Taikeff, of Counsel), *for Plaintiffs-Appellants.*

GAINSBURG, GOTTLIEB, LEVITAN & COLE, New York, New York (Samuel Gottlieb, Alan C. Krieger, of Counsel), *for Plaintiff-Intervenor-Appellant.*

A. SETH GREENWALD, Asst. Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General for the State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of Counsel), *for Defendant-Appellee Ghezzi and Attorney General, Pro se.*

WILLIAM P. DEWITT, New York, New York (Adrian P. Burke, Corporation Counsel for the City of New York), *for Defendants-Appellees Katz, Irizarry and New York City Board of Elections.*

DIKMAN & BOTTER, Jamaica, New York, *for New York City Family Court Judges' Ass'n, Amicus Curiae*

MILLER, SINGER, MICHAELSON & RAIVES, New York, New York (Alfred Miller, Stephen L. Solomon, of Counsel), *for American Ass'n of Retired Persons, Amicus Curiae.*

PER CURIAM:

Philip J. Zichello, one of the named plaintiffs in this action commenced in the United States District Court for the Southern District of New York, was a Judge of the

Civil Court of the City of New York, elected for a term which commenced on January 1, 1970. Although the normal term of office for this position is ten years, the New York State Constitution (Art. 6, § 25) and the Judiciary Law (§ 23) provide for mandatory retirement at the age of 70. Since Judge Zichello was born in 1904, his term expired under state law on the last day of December, 1974. The second named plaintiff, Pietro C. Rubino, is a voter over 70 who alleges that he voted for Zichello. The intervenor, Harry T. Nusbaum, is also a Judge of the Civil Court of the City of New York who was elected on November 4, 1969 but who will become 70 in 1978, which will result in his mandatory retirement on December 31, 1978, or one year prior to the end of the normal ten-year term. The complaint below sought preliminary and permanent injunctive relief against the enforcement of the cited state constitutional and statutory provisions as violative of the First and Fourteenth Amendments of the United States Constitution, and further sought the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 & 2284. Rubino also sought class action treatment as the representative of all voters over 70 in the state, as well as all persons who voted for Judge Zichello. On the return day of an order to show cause, October 18, 1974, Judge Thomas P. Griesa of the United States District Court for the Southern District delivered an opinion finding that there was no substantial federal question which would justify the convening of a three-judge court and dismissed the complaint. This appeal followed.

The question before us is whether, under the rule of *Goosby* v. *Osser*, 409 U.S. 512 (1973), the district court properly determined that the constitutional grounds raised by the plaintiffs were wholly insubstantial and frivolous. We are of the opinion that the issue of age restrictions

upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the effort to clothe it in constitutional garb is frivolous. We therefore affirm the dismissal of the complaint.

The cases primarily relied upon by the plaintiffs to establish the First Amendment rights of the candidate to run for office and of the voter to be free to elect aged candidates (*Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974); and *Storer* v. *Brown*, 415 U.S. 724 (1974)) all involved restrictions upon access to the ballot, which is not the issue here. The judges seeking relief here were on the ballot and no one was precluded from voting for them. Both took office for a term clearly established by the legislature and the state constitution and they are properly subject to the conditions imposed by the state upon the length of the term. *Gordon* v. *Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971). We find no authority at all which would support the contention that Rubino as a citizen over 70 has any constitutional right to vote for the elderly. We do not deem age to be a suspect classification requiring any strict scrutiny of the state's scheme of age restrictions upon judicial terms of office. See *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd, 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973). It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable.

The claim that the mandatory retirement age violates the due process and equal protection clauses is, we believe, clearly insubstantial in view of the holding of the

Supreme Court in *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974). The Court there dismissed, for want of a substantial federal question, an appeal from the Pennsylvania Supreme Court which upheld a state law requiring retirement of police at age 60. On the basis of that decision, a three-judge court for the District of Columbia in *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (1974) dismissed a complaint which sought a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 U.S.C. § 8335, was unconstitutional because it mandates a 70-year-old retirement age for federal employees irrespective of the health or mental abilities of the employee. The court there examined the Jurisdictional Statement in *McIlvaine* and concluded, as we have here, that the issues of equal protection and due process* were before the Court in *McIlvaine*, and that the Supreme Court did not consider those issues to present a substantial federal question. An appeal was taken to the Supreme Court from the decision in *Weisbrod* and the Court affirmed the dismissal of the complaint. 43 U.S.L.W. 3464 (Feb. 24, 1975). Since the issues before us are substantially similar, if not identical, to those presented in *Weisbrod* and *McIlvaine*, we believe that the court below correctly concluded that there was no substantial federal question and properly dismissed the complaint.

Affirmed.

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* Appellants' principal due process argument is founded upon the irrebuttable presumption doctrine, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973), which has been said to resemble equal protection analysis, *Cleveland Bd. of Educ.* v. *LaFleur*, *supra*, 414 U.S. at 652 (Powell, *J.*, concurring in result); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974). The *Weisbrod* court was faced with the same argument.

Opinion of the District Court for the Southern District of New York

[A22] The Court: Let me put my decision on the record.

This is an action brought by Philip J. Zichello, a Judge of the Civil Court in New York City, who was elected to that office on November 4, 1969, and assumed his duties on January 1, 1970.

Judge Zichello was born November 1, 1904, and will be 70 years old at the first of November of this year.

Judge Zichello seeks a declaration of the invalidity of the provision in the New York Constitution and the provision in the New York Judiciary Law providing mandatory retirement of Civil Court Judges at the age of 70.

The relevant provisions are Article VI, Section 25B of the New York Constitution and Section 23 of the New York Judiciary Law.

Judge Zichello urges that he is entitled to serve his full ten-year term as provided by another provision of the New York Constitution, Article VI, Section 15.

All of these constitutional and statutory provisions have been in effect for a number of years and were in effect at the time Judge Zichello was elected in 1969, and at the time he assumed his duties, January 1, 1970.

In addition to Judge Zichello, there is also a plaintiff by the name of Pietro C. Rubino. Mr. Rubino is a voter in the district which elected Judge Zichello. He [A23] voted for Judge Zichello. He is over 70 years of age. He brings this action on behalf of himself and in behalf of all other persons who voted for Judge Zichello in 1969 and all eligible voters in the state over the age of 70.

Judge Zichello does not attempt to represent a class. As of today, intervention was permitted to another Civil Court Judge, Harry T. Nussbaum.

The plaintiffs request the convening of a three-judge court under 28 USC Section 2281 on the ground that this is an action to enjoin a state statute.

The defendants urge that there is no substantial federal question, no substantial constitutional question, and that the three-judge court should not be convened and the action should be dismissed.

I am denying the motion to convene a three-judge court and dismissing the action.

A variety of arguments have been made to the effect that the mandatory retirement provisions under New York law applicable to the Civil Court Judges violate the United States Constitution, particularly the First and Fourteenth amendments.

I find that none of these arguments are substantial. For instance, plaintiffs argue that the 70 year retirement provision violates Judge Zichello's First Amendment right [A24] to seek and hold office. The cases cited under this heading of the argument have nothing really to do with a retirement provision.

In my view there is no case under the First Amendment which can reasonably be interpreted as preventing the State of New York from establishing terms for its elected officials, including judges, and as part of the establishment of such terms, it would seem obvious that the State may, in its Constitution and in its statutes, provide for retirement of judges at the age of 70 years.

I will not deal specifically with every single one of the constitutional arguments presented by plaintiffs. I will not deal specifically in this bench decision with each and every

such argument. I have considered the arguments and I find them without merit.

Basically, it seems to me clear that the people of the State of New York in their Constitution and the Legislature of the State of New York in its Judiciary Law have the unquestioned right to provide for mandatory retirement of judges at the age of 70. There can be no reasonable argument in my view that such constitutional and statutory provisions deprive Judge Zichello of liberty or property, or interfere with his First Amendment rights under the Federal Constitution.

There is abundant evidence, to say the least, of [A25] actions taken by administrative boards, the Congress of the United States, and state legislatures in establishing retirements for the age of 70 or ages thereabouts. There is such a body of legislative activity of this kind as to make it really impossible to say that the people of New York and the Legislature of New York were unreasonable in their mandatory retirement provisions or violated the Federal Constitution in any way.

One specific argument should be dealt with, and that is an equal protection argument relating to a differentiation in treatment as to the Civil Court Judges versus certain other judges or justices of the state.

It is provided in the case of the Judges of the New York State Court of Appeals and Justices of the Supreme Court that these two types of judges may, following the age of 70, perform the duties of a Justice of the Supreme Court provided that it shall be certificated that the services of such Judges or Justices are necessary to expedite the business of the court, and that such persons are mentally and physically able and competent to perform the full duties of such office. Service under this provision may be made

under the conditions specified until the individual reaches the age of 76.

It seems to me perfectly clear that this is not a denial of equal protection. The legislature and the people [A26] of the State of New York in their Constitution and in their Judiciary Law had a perfectly valid ground, without question, to make a minor differentiation between the two categories of judges and provide for a short additional service under certain circumstances for Court of Appeals Judges and Supreme Court Justices in the State Supreme Court.

The differentiation in treatment does not in my view in any way raise a constitutional question. It goes without saying that in my dismissal of this case and in my refusal to convene a three-judge court, I am in no way indicating any lack of sympathy with the position and views of Judge Zichello and the others who have appeared before me today and the others who are interested in this proceeding.

I know as well as anyone that men who have passed the age of 70 years can continue to perform all kinds of services, including services on the judiciary, and I know as well as anyone that blanket retirement rules can have their effects of imposing hardship in individual cases. But it is equally clear that it is my limited function to try to assess the existence or non-existence of a valid question as to whether the New York provisions violate the Federal Constitution.

I am not acting as a drafter of the New York [A27] Constitution or as a member of its Legislature, and having in mind my limited role, I can not conscientiously hold that there is any constitutional question which requires the continuation of this action and I am dismissing it.